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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-159

DAVID R. GREEN,

Petitioner,

versus

AMERADA HESS CORPORATION,

Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals For
The Fifth Circuit

BRIEF IN OPPOSITION FOR AMERADA HESS CORPORATION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, affirming the unreported Opinion of the

District Court, reported at 612 F.2d 212 (1980), rehearing and rehearing en banc denied, 614 F.2d 1298 (1980).

JURISDICTION

The Petition for Certiorari (hereinafter referred to as the "Petition") has adequately set forth the jurisdiction of this Court.

QUESTIONS PRESENTED

The sole question which could be properly presented to this Court, but which has not been presented by Petitioner, is whether Petitioner has a civil cause of action for wrongful discharge under Mississippi law on the ground that he was discharged for pursuing his rights under Mississippi's workmen's compensation statutes. The four questions presented by Petitioner are improperly raised for the first time in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This case does not properly involve the Fifth Amendment to the United States Constitution or any other federal constitutional provisions, treaties, statutes, ordinances or regulations.

STATEMENT OF THE CASE

Petitioner (hereinafter referred to as "Green") was first employed by Respondent (hereinafter referred to as "Amerada Hess") on January 1, 1972. (R. 61, 186) He did not have a written contract of employment during the entire time that he worked for Amerada Hess, but was hired for an indefinite period of time. (R. 142a, 186) On April 15, 1973, while in the employ of Amerada Hess, Green sustained an injury as a result of an employment-related accident. (R. 1, 200) Green filed an accident report the next day, but continued working until April 9, 1974, at which time he entered the hospital for diagnostic tests.

(R. 92, 191) After a one-week hiatus, Green returned to work until October, 1974, when he was hospitalized for back surgery. (R. 2, 191) After recuperating, he resumed his employment in December, 1974. (R. 191) On July 24, 1975, Green's employment with Amerada Hess was terminated for cause[1]. (R. 186, 192).

On June 12, 1978, Green filed a complaint in the United States District Court for the Southern District of Mississippi, Eastern Division (hereinafter referred to as the "District Court"), alleging that Amerada Hess wrongfully discharged him for pursuing his rights under Mississippi's workmen's compensation act, MISS. CODE ANN. §§ 71-3-1

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[1]Although Green's allegations were taken as true by the District Court for the sole purpose of considering whether Green had a wrongful discharge cause of action under Amerada Hess' Motion for Summary Judgment, Amerada Hess has consistently maintained that Green was terminated for cause.

et seq. (1972) (R. 1-3, 207). Jurisdiction was based solely on diversity of citizenship under 28 U.S.C. § 1332. (R. 209, Pet. App. A, at 9a)

On June 21, 1978, the District Court granted Amerada Hess's Motion for Summary Judgment on the sole ground that Green's claim did not state a valid cause of action under Mississippi law. The elements of the District Court's decision, rendered in the absence of controlling Mississippi precedent, were: (1) Green was employed for an indefinite term and, therefore, his employment was terminable at the will of either party under Mississippi law; (2) the Mississippi workmen's compensation act provided no wrongful discharge cause of action; and (3) therefore, Green had no such wrongful discharge cause of action under Mississippi law. (R. 209-211, Pet. App. B at 8a-9a).

Green appealed the District Court's ruling to the United States Court of Appeals for the Fifth Circuit (hereinafter referred to as the "Court of Appeals") on August 2, 1979 (R. 212) on the "sole question" of whether Green "had a cause of action for being discharged in retaliation for filing a workmen's compensation claim." Appellant's Brief, at 1) The case was placed on summary calendar and on February 21, 1980, the Court of Appeals affirmed the District Court's ruling on the sole state law ground considered by the District Court. The Court of Appeals agreed that since Green's employment was terminable at will under Mississippi law, and since the Mississippi workmen's compensation act provided no wrongful discharge cause of action, then Green had no such wrongful discharge cause of action under Mississippi law. 612 F.2d at 214 (Pet. App. A at 2a-4a). Green's petition for rehearing and

rehearing en banc was denied by the Court of Appeals on March 18, 1980.

REASONS FOR DENYING THE WRIT

I.

The Decision Of The District Court And The Affirming Decision Of The Court Of Appeals Were Based Solely On An Issue Of State Law In The Absence Of Controlling State Precedent, Which Issue Was Not Presented As A Question In The Petition.

This diversity case involves exclusively a determination of Mississippi law by the District Court, which was upheld on the same state law ground by the Court of Appeals. This Court accepts a determination of state law as found by a court of appeals in a diversity action, particularly when the same finding is made by the federal district court. Appalachian Power Co. v. American Institute of Certified Public Accountants, 4 L.Ed.2d 30, 32 (1959) (opinion in chambers), and will not set aside the decisions of lower courts applying state law

"except on a plain showing of error." Palmer v. Hoffman, 318 U.S. 109, 118, rehearing denied 318 U.S. 800 (1943).

This court applied these standards in a recent case dealing with the rights of a terminable at will city employee under a city employment discharge ordinance, Bishop v. Wood, 426 U.S. 341 (1976). This Court stated:

> We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge, who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner 'held his position at the will and pleasure of the city' [since the employment contract was "'terminable at the will of either party.'"] This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit, albeit by an equally divided court. In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have

> concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.
>
> The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court...; and it was accepted by the Court of Appeals for the Fourth Circuit. These reasons are sufficient to foreclose our independent examination of the state-law issue.

Id. at 346, n.9, 347 (emphasis added).

The instant case and Bishop are similar in several important respects: (1) The district court judge in each case was required to interpret state law in the absence of controlling state law precedent; (2) each court of appeals placed special weight on the district court judge's familiarity with state law; and (3) as in Bishop, the decision of the District Court below on the state law issue is tenable; is based on state case and statutory law; and was accepted by the Court of Appeals. Thus, this Court should accept the decisions of

the District Court and the Court of Appeals and deny the Writ of Certiorari (hereinafter referred to as the "Writ").

Furthermore, Green did not present as a question for review in the Petition this single state law question presented to and considered by the District Court and the Court of Appeals - whether Green has, under Mississippi law, a cause of action for wrongful discharge for pursuing workmen's compensation rights. Rule 23 of the revised rules of this Court provides that "[o]nly the question set forth in the petition or fairly comprised therein will be considered by the court." Since Green did not present this issue as a question for review in his Petition, then it is not properly before this Court. E.g. Lawn v. U. S., 355 U.S. 339, 362, n.16 (1957). Therefore, the Petition presents no legitimate questions for consideration and the Writ should be denied.

II.

The Questions Presented By Green's Petition Were Not Considered By The Courts Below And Are Improperly Raised For The First Time In The Petition.

Instead of presenting in his Petition the sole state law question that could properly come before this Court, Green has raised four questions which were not presented to or considered by the courts below and for which there is no support in the record. This Court does not ordinarily consider questions raised for the first time in the petition for certiorari. Helvering v. Minnesota Tea Co., 296 U.S. 378, 380 (1935). This position was recently well-stated in Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971):

> We find no reference to this aspect of the case in the opinions of the District Court and the Court of Appeals. We are unsure whether it was presented below and whether, in any event, there is record support for it. Accordingly, we deem it inappropriate to consider it in the first instance.

Therefore, no questions are properly presented to this Court for consideration, requiring the denial of the Writ.[2]

For the sole purpose of further showing to this Court that the Writ should be denied, we will briefly address Green's arguments under each of the four questions improperly presented to this Court.

A. Green has no written, fixed-term contract with Amerada Hess.

Green contends that he has a "written fixed term contract" based on the existence of the Amerada Hess personnel handbook

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[2]Even where an issue is "belatedly raised on oral argument in the Court of Appeals and given "cursory treatment", this Court has held that such an issue is not properly before it on petition for certiorari. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 108, n.21 (1979). Green did not argue to the District Court that he had a "written fixed term contract" with Amerada Hess and there was no oral argument before the Court of Appeals. Furthermore, Green did not present the question in his appellate briefs to the Court of Appeals.

(which discusses the company pension plan, savings and stock bonus plan, medical, and income protection and life insurance plans and additional employee benefits), entitled "Benefit Program for Employees", and based on an alleged agreement to invest 4% of his monthly income in Amerada Hess. This latter "agreement" is apparently participation by Green in the savings and stock bonus plan.

This argument is in direct conflict with the concurrent finding of fact by the District Court and the Court of Appeals, which Green did not contest, that Green had no written employment contract but was hired for an indefinite period of time. This Court will not review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. E.g. Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1948), affirmed 339 U.S. 605 (1949). There was

no such error below since the record supports the finding by affidavit (R. 186) and by the admission of Green himself in his deposition that he had no written contract of employment with Amerada Hess. (R. 142a) Furthermore, the bases for the implication for a fixed term contract, the personnel handbook and the alleged investment agreement, are not even part of the record. This Court has held that it will not consider documents that are not record evidence in the courts below. E.g. New Haven Inclusion Cases, 399 U.S. 392, 450, n.66 (1970). Therefore, this Court should not review this concurrent finding of fact.

As to the substance of Green's argument, the personnel handbook merely informed employees about company benefit plans and contained no language which could be construed as an employment contract for a fixed term. See Schroeder v. Dayton-Hudson Corp., 448 F.Supp. 910, 916-917

(E.D. Mich. 1978) (personnal handbook held not to be a fixed term contract, but merely informed employees about company benefits and policies). Green's participation in the savings and stock bonus plan was not "independent consideration" evidencing a contract for a definite term, which is a state law question not raised or considered by the courts below and therefore not before this Court. This plan is essentially a voluntary payroll savings and investment plan. Green's contributions to the plan could be completely withdrawn at any time and, shortly after Green's termination, the total value of his contributions were paid to him as required by the plan.

B. Green has no property interest in continued employment with Amerada Hess.

Green argues that he has a property interest in continued employment with Amerada Hess. This contention has no

merit since a terminable at will employee, such as Green, has no property interest in his job under Mississippi law. This conclusion is supported by Bishop v. Wood, supra, in which this Court stated that "a holding that as a matter of state law the employee 'held his position at the will and pleasure of the city' necessarily established that he had no property interest." 426 U.S. at 345, n.8.

C. Green has no Fifth Amendment due process protection regarding his discharge by Amerada Hess.

Even if Green had a property interest in his job with Amerada Hess, he was not entitled to any Fifth Amendment due process protection with respect to his discharge. Amerada Hess is a private employer and the Fifth Amendment places restrictions only on the federal government, not private parties. E.g., Public Utilities Commission v. Pollak, 343 U.S. 451, 461-62 (1951).

Only federal government employees can claim Fifth Amendment due process protection with respect to employment discharges. Green has no rights under the Fifth Amendment due process clause.

D. This Court recognizes the validity of the terminable at will employment relationship and will not arbitrarily eliminate this important employment status.

Green argues that if his employment is terminable at will under Mississippi law, then this Court should eliminate the terminable at will relationship in private employment by implying a requirement that such employees be discharged only for cause. Thus, Green has requested this Court to create a wrongful discharge cause of action for employees hired for an indefinite time and without a written contract.

This Court has acknowledged that the terminable at will employment relationship is "a recognized principle of law." National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206, 219 (1939). This

Court further recognized in a recent case, Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 324 (1972), that "the very concept of 'wrongful discharge' implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will." Thus this Court has made it clear that it will not create a wrongful discharge cause of action where the discharged employee is terminable at will as Green is.

Additionally, the terminable at will employment relationship provides indefinite term employees an equal right to terminate their employment at any time and without any justification or notice to their employers. The terminable at will rule, therefore, is fair and equitable for both employers and employees and should not be eliminated or modified.

III.

The Single State Law Issue Properly Presented To This Court Presents No Conflict Of Decisions Or Important Questions Of Federal Law.

The decision of the Court of Appeals is not in conflict, directly or otherwise, with the decisions of this Court or of another Court of Appeals, or with Mississippi law on the only issue that could properly be brought before this Court - whether Green, a terminable at will employee, has a wrongful discharge cause of action under Mississippi law for being discharged for pursuing workmen's compensation rights. This Court has not addressed this issue nor has the Mississippi Supreme Court. The only other court of appeals decision (and also the only other federal court decision) on this specific issue, Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977), decided this issue in complete harmony with and employed the same analysis as the

ruling of the Court of Appeals below.[3] Even if there were conflicting decisions among the circuits on this issue, this conflict would not be a reason for granting Green's Petition. "As to questions controlled by state law...conflict among circuits is not of itself a reason for granting a writ of certiorari" since the "conflict may be merely corollary to a permissible difference of opinion in the state courts." Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 206 (1937). Furthermore, as Ruhlin points out, conflict among the state courts on the wrongful discharge

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[3]The other Court of Appeals decisions dealing with the general issue of whether a terminable at will employee has a cause of action for wrongful discharge have upheld the denial of such causes of action on summary judgment. See Moore v. Home Insurance Co., 601 F.2d 1072, 1074-75 (9th Cir. 1979) (wrongful discharge cause of action denied to terminable at will employees; summary judgment for employer affirmed); Crownover v. Sears Roebuck & Co., 594 F.2d 565, 566 (6th Cir. 1979) (same holding); Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979) (same holding).

issue is no basis for granting the Writ in this case.

The Court of Appeals has not decided an important question of federal law which would justify the granting of a Writ of Certiorari. Instead, the sole issue presented to and considered by the Court of Appeals, as well as the District Court, concerned an interpretation of Mississippi law. As stated above, this Court does not grant a Writ of Certiorari to review a state law issue interpreted harmoniously by a district court and a court of appeals. This rule is particularly applicable to this case where the state law rights of a single private individual are being litigated and where the state law being attacked, the terminable at will rule, is based on the traditional common law.

Additionally, the federal question submitted by Green - whether he was deprived of a property interest in violation of the Fifth Amendment due process clause - was

improperly raised for the first time in Green's Petition. In any event, the question has no merit since the Fifth Amendment affords no protection to private parties such as Green. Therefore, the Writ should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EDMUND L. BRUNINI, JR., one of the attorneys for Respondent, Amerada Hess Corporation, hereby certify that I have this day mailed the requisite number of true copies of Amerada Hess Corporations's foregoing Brief to counsel for David R. Green, separately represented at their usual post office addresses, by first class U. S. Mail, postage prepaid, as follows: Dixon L. Pyles, Esq., Pyles & Tucker, 507 East Pearl Street, Jackson, Mississippi 39201; and James M. Brown, Esq., Butler & Brown, Post Office Box 393, Laurel, Mississippi 39940.

DATED: September 24, 1980.

E. L. Brunini, Jr.

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